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Duruvendran a/l Sakajaven v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–104–04 OF 2012
ABU SAMAH NORDIN, AZIAH ALI AND HAMID SULTAN JJCA
11 AUGUST 2016

C *Criminal Law — Murder — Appeal against conviction and sentence — Appellant charged and found guilty of murder — Whether appellant's defence that deceased murdered by left-handed person supported by evidence — Whether s 114(g) of the Evidence Act 1950 applicable against respondent for failure to produce material evidence — Whether defence that murder committed by another individual proven — Evidence Act 1950 s 114(g) — Penal Code s 302*

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The appellant was charged at the trial court for the offence of murder of one Surendren a/l Ramesh ('the deceased') committed at the deceased's house in Bayan Lepas, Penang. The trial court found that the defence of the appellant in shifting the blame to one Eswaran was a bare denial. On the totality of the evidence, the trial judge found that the respondent had proved its case beyond reasonable doubt and convicted and sentenced the appellant for the offence of murder under s 302 of the Penal Code, hence this appeal. The appellant submitted that the learned trial judge had failed to consider the testimony of the consultant pathologist ('PW3') that the slash wound to the deceased's neck had extended from below the right earlobe to the left earlobe, hence, it must have been inflicted by a person who was left-handed. The appellant further submitted that the failure of the respondent to produce the towel that was wrapped around the deceased's neck had prejudiced the defence since the appellant had stated that the towel was used by one Eswaran, hence, s 114(g) of the Evidence Act 1950 ('the Act') ought to have been invoked against the respondent. The next issue raised by the appellant was with regard to the absence of blood on the appellant's school uniform and shoes. It was also the appellant's defence that the murder was carried out by Eswaran who had locked the deceased from behind and slashed the deceased's neck with a knife with black handle (exh P65A).

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Held, dismissing the appeal and affirming the conviction and sentence by the High Court:

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(1) A mere description of the wounds on the deceased's neck coupled with the absence of a specific assertion by PW3 that the slash wounds could only have been inflicted by a left-handed person was not sufficient to support learned counsel's contention that these wounds could only have

been inflicted by a left-handed person. There was also no evidence to indicate that the appellant was a right-handed person. This matter was never put to him when he was in the witness box (see para 36).

(2) The explanation given by PW11 who had assisted PW3 that the towel went missing when it was in the custody of the hospital, it had been inadvertently disposed of by the hospital cleaner and that despite efforts made, the towel could not be found was not seriously challenged. The trial judge had accepted the explanation provided by the respondent and the court agreed with the trial judge. On the evidence the court found that s 114(g) of the Act did not apply (see para 39).

(3) The evidence indicated that sometime between 8–10.55am, the appellant had changed from his school uniform to his t-shirt. The reasonable inference was that when the appellant went to the deceased's house, he had worn his school t-shirt and not his school uniform. When the appellant returned to school, he was again in his school uniform. The fact that the appellant was absent from school for approximately three hours from about 8–10.55am was not disputed. In the circumstances, there was sufficient time for him to change his clothes (see para 45).

(4) Based on the appellant's evidence, Eswaran had locked the deceased from behind and slashed the deceased's neck with a knife with a black handle. The chemist report however showed that only the deceased's DNA was found on the knife, exh P65A, but a mixed DNA profile of both the deceased and the appellant was found on the knife, exh P67A. The appellant's attempt to implicate Eswaran in the murder of the deceased was unsupported by any credible evidence. The court was of the view that it was a feeble attempt to deflect blame (see paras 48–49).

[Bahasa Malaysia summary

Perayu telah dituduh di mahkamah perbicaraan kerana kesalahan membunuh Surendren a/l Ramesh ('si mati') yang dilakukan di rumah si mati di Bayan Lepas, Pulau Pinang. Mahkamah perbicaraan mendapati bahawa pembelaan perayu dalam mengalih kesalahan Eswaran adalah penafian kosong. Berdasarkan keseluruhan keterangan, hakim perbicaraan mahkamah mendapati bahawa responden telah membuktikan kesnya melampaui keraguan munasabah dan mensabitkan dan menghukum perayu kerana kesalahan membunuh di bawah s 302 Kanun Keseksaan, justeru rayuan ini. Perayu telah berhujah bahawa hakim perbicaraan yang bijaksana telah gagal mempertimbangkan testimoni perunding patologi ('PW3') bahawa luka tetakan kepada leher si mati bermula dari bawah cuping telinga kanan hingga cuping telinga kiri, justeru, ia mungkin telah dilakukan oleh seseorang yang kidal. Perayu selanjutnya berhujah bahawa kegagalan responden mengemukakan tuala yang dibungkus keliling leher si mati telah memprejudiskan pembelaan kerana perayu telah menyatakan bahawa tuala itu

telah digunakan oleh Eswaran, justeru, s 114(g) Akta Keterangan 1950 ('Akta tersebut') patut digunakan terhadap responden. Isu seterusnya yang ditimbulkan oleh perayu adalah berkenaan tiada darah pada baju sekolah dan kasut perayu. Ia juga adalah pembelaan perayu bahawa pembunuhan itu telah dilakukan oleh Eswaran yang telah memegang si mati dari belakang dan menetak leher si mati dengan pisau yang mempunyai pemegang hitam (eksh P65A).

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman oleh Mahkamah Tinggi:

(1) Keterangan semata-mata tentang luka di leher si mati serta ketiadaan penegasan tertentu dengan PW3 bahawa luka tetakan hanya mungkin boleh dilakukan oleh seseorang yang kidal tidak mencukupi menyokong pendapat peguam yang bijaksana bahawa luka tersebut hanya boleh dilakukan oleh seseorang yang kidal. Juga tidak terdapat apa-apa keterangan untuk menunjukkan bahawa perayu adalah seorang tangan kanan. Perkara ini tidak pernah dikemukakan kepadanya semasa dia di kandang saksi (lihat perenggan 36).

(2) Penjelasan yang diberikan oleh PW11 yang membantu PW3 bahawa tuala itu telah hilang semasa ia dalam jagaan hospital, ia telah secara tidak sengaja dibuang oleh pencuci hospital dan bahawa meskipun usaha telah dibuat, tuala itu tidak ditemui tidak dicabar secara serius. Hakim perbicaraan telah menerima penjelasan yang dikemukakan oleh responden dan mahkamah bersetuju dengan hakim perbicaraan. Berdasarkan keterangan itu mahkamah mendapati bahawa s 114(g) Akta tersebut tidak terpakai (lihat perenggan 39).

(3) Keterangan menunjukkan bahawa sekitar antara 8–10.55 pagi, perayu telah menukar baju sekolahnya kepada kemeja-Tnya. Inferens munasabah adalah apabila perayu pergi ke rumah si mati, dia telah memakai kemeja-T sekolahnya dan bukan baju sekolahnya. Apabila perayu pulang dari sekolah, dia sekali lagi berada dalam baju sekolahnya. Fakta bahawa perayu tidak hadir di sekolah selama tiga jam dari pukul 8–10.55 pagi tidak dipertikaikan. Dalam keadaan itu, terdapat masa yang mencukupi untuknya menukar pakaiannya (lihat perenggan 45).

(4) Berdasarkan keterangan perayu, Eswaran telah memegang si mati dari belakang dan menetak leher si mati dengan pisau yang mempunyai pemegang hitam. Laporan ahli kimia bagaimanapun menunjukkan bahawa hanya DNA si mati ditemui pada pisau, eksh P65A, tetapi profil DNA campuran kedua-dua si mati dan perayu ditemui pada pisau, eksh P67A. Cubaan perayu untuk mengaitkan Eswaran dalam pembunuhan si mati tidak disokong oleh apa-apa keterangan yang boleh dipercayai. Mahkamah berpendapat bahawa ia adalah cubaan yang lemah untuk mengalihkan kesalahan itu (lihat perenggan 48–49).]

Notes

For a case on appeal against conviction and sentence, see 4(2) *Mallal's Digest* (5th Ed, 2015) para 1736.

Cases referred to

Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Hanif Basree bin Abdul Rahman [2008] 3 MLJ 161, FC (refd)
PP v Nomezam Apandy bin Abu Hassan (No 2) [2008] 1 MLJ 681, HC
Syed Ali bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132, FC (refd)

Legislation referred to

Child Act 2001 s 97(2)
Evidence Act 1950 ss 8, 114(g)
Penal Code s 300, limb (b)

Appeal from: Criminal Trial No 45–29 of 2011 (High Court, Pulau Pinang)

Yagoo Subramaniam (Yagoo & Assoc) for the appellant.
Lailawati bt Ali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Aziah Ali JCA (delivering judgment of the court):

[1] The appellant was charged for the offence of murder. At the end of the prosecution case, the trial judge had amended the charge which reads as follows:

> Bahawa kamu pada 11.8.2010 di antara jam 8.00 pagi hingga 11.00 pagi di Tingkat 1, Blok 88C-01-04, Jalan Paya Terubong, Taman Sri Relau, Bayan Lepas, di dalam Daerah Timur Laut, dalam Negeri Pulau Pinang telah membunuh Surendren a/l Ramesh, (No. K/P: 970723-07-5629), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] The charge as amended was read and explained to the appellant and he claimed trial. At the conclusion of the trial, the trial judge found the appellant guilty and convicted him. At the material time the appellant was 15 years 11 months old. Pursuant to s 97(2) of the Child Act 2001 (Act 611) the appellant was sentenced to be detained in prison during the pleasure of the TYT Yang DiPertua Negeri Pulau Pinang. The appellant appeals to this court against his conviction and sentence.

[3] We heard the appeal and the submissions made by learned counsel, Mr Yagoo Subramaniam and the learned deputy public prosecutor ('DPP') Puan Lailawati Ali, for the respondent. By a unanimous decision we dismissed the appeal and affirmed the conviction and sentence of the High Court. We

now give our reasons below. For the purpose of this judgment we reproduce the salient facts.

SALIENT FACTS

[4] On 11 August 2010 at about 12.50pm, Ramesh a/l Krishna ('PW5') received a phone call from his daughter Keethanjeli ('DW2') to inform him that her brother Surendren a/l Ramesh ('the deceased') who attended the afternoon session, had not come to school. DW2 was in the morning session at the same school.

[5] PW5 went back to his home which is a three-room flat on the first floor bearing the address 88C-1-4, Taman Sri Relau, Bayan Lepas, Penang. He found the grille and wooden doors of his house slightly ajar. PW5 entered the flat. In a room PW5 saw the deceased lying on the floor in a pool of blood.

[6] The police were then notified. Sargent Marzuki bin Abdul Rahman ('PW6') who had received information of the murder lodged a report (exh P15). PW6 then informed senior investigating officer ASP Mohamad Khalid ('PW7'), who then proceeded to the scene together with police photographer, L/Cpl Shamsuddin bin Mat ('PW1'). At the scene PW1 took 33 photographs (exhs P3(1–33)).

[7] PW7 testified that in the room at the rear of the flat, he saw the deceased lying on his back with blood around his neck. Then another investigating officer who had also been notified of the crime, ASP Jafry bin Md Zain ('PW8'), arrived. PW7 briefed PW8 who then took over investigation of the crime scene.

[8] According to PW8, the room where the deceased was found was in a mess. There was a lot of blood on the floor and wall. PW8 collected numerous exhibits at the scene (pp 271–285 appeal record) which he recorded in the 'Borang Serah Menyerah Barang Kes' (exh P21).

[9] At about 4.15pm the same day, ASP Chuah Seong Lim ('PW4') together with some police personnel went to premises known as Pasar Mini, Desa Kolam Ikan. There he met the owner named Sakajaven a/l Joseph who turned out to be the appellant's father. PW4 asked Sakajaven about the appellant. Sakajaven called for the appellant who came out from a room in the premises.

[10] PW4 noticed that the appellant had both his hands in his trouser pockets. PW4 asked the appellant to remove his hands from the pockets. Upon examining the appellant's hands, PW4 found wounds on both palms of his

hands and on his left earlobe. PW4 also recovered a Nokia handphone from the appellant. PW4 arrested the appellant. In answer to questions posed by PW4, the appellant gave certain information to PW4 which PW4 then communicated to PW7 and PW8. According to PW4 he had recorded what the appellant had told him in the police report that he had lodged (exh P10).

[11] The appellant then led PW4, PW7, PW8 and police photographer PW2 to a flat at 4-4-1 Jalan Kolam Ikan, Desa Kolam Ikan, Bayan Lepas. Present in the group was the appellant's mother. Upon arrival, PW4 found the front grille door and wooden door locked. The appellant's mother unlocked the doors. They entered the flat. Inside the flat the appellant showed to PW4 the following exhibits:

(a) a pair of green-coloured school trousers in an orange-coloured basket near the bathroom (exh P51A);

(b) a pair of white shoes on the bathroom window sill (exh P52A);

(c) a black-coloured sling bag bearing the brand name 'Adidas' (exh P53A); and

(d) a blue coloured sling bag on the sofa in the living room (exh P55A).

On the ground floor of the flat, a blood-stained white and green coloured t-shirt bearing the words 'SMK Tun Raja Uda' (exh P56A) was also recovered from a dustbin. The exhibits were collected by PW8.

[12] PW4 then brought the appellant back to the Bayan Lepas Police Station. In answer to questions posed by PW4, the appellant then led PW4, PW7, PW8 and PW1 to premises known as Flat Lengkok Mahsuri, Bayan Baru. At this place, the appellant led PW4 to the rubbish dumpsite and showed to PW4 the following exhibits:

(a) a pair of blue coloured jeans (exh P70A);

(b) a light blue coloured t shirt (exh P69A);

(c) a knife with a black handle (exh P65A); and

(d) a knife and a broken blade on which was written the word 'CHUYA' (exhs P67A and 67B).

PW8 collected these exhibits and handed them over to PW7 who marked the exhibits and put them in envelopes which he marked as 'K1' to 'K35' (exh P21) before handing over these exhibits to the Chemistry Department for analysis. The exhibits were analysed by the chemist, Padillah bt Yahya ('PW12') who prepared a report (exh P25).

[13] The chemist report shows that the DNA of the deceased was found on the following exhibits:

(a) blood stains taken from inside the room where the deceased was found;

(b) blood stains taken from the dining room floor of the deceased's house;

(c) a sample of the deceased's hair (exh P59A);

(d) the deceased's shorts and t-shirt (exhs P60A and P61A);

(e) the knife with the black handle (exh P65A);

(f) a blue coloured t-shirt bearing the word 'ELEMENT' (exh P69A); and

(g) a pair of blue jeans bearing the words 'UNITS MAN' (exh P70A).

[14] The chemist report also shows that the appellant's DNA was found on the following exhibits:

(a) a white curtain taken from the deceased's room (exh P35A);

(b) swab of blood samples taken at the crime scene (exhs P36A, P38A, P40A and P44A); and

(c) a white and green coloured t-shirt bearing the words 'SMK Tun Raja Uda' (exh P56A).

[15] Mixed DNA of the appellant and the deceased were found on the following exhibits:

(a) blood samples taken from inside the deceased's house (exhs P33A, P37A, P39A, P42A and P43A); and

(b) the knife with the detached handle bearing the word 'CHUYA' (exhs P67A and 67B).

[16] The consultant pathologist at the Penang General Hospital, Dato' Dr Bhupinder Singh ('PW3') conducted the post-mortem on the deceased. PW3 prepared a post-mortem report (exh P7) which he handed over to PW7. According to the post-mortem report, the cause of death was slash wounds to the neck.

[17] PW3 found 27 injuries on the deceased out of which, two injuries to the neck (injuries Nos 7 and 8) were fatal. Injury No 7 was a slash wound to the upper part of the neck extending from below the right earlobe to the left earlobe. Injury No 8 was a traverse slash wound across the middle of the neck. The slash wounds over the neck region had cut the submandibular glands, the epiglottis, the cervical spine, the blood vessels and the tissues in the region. Injuries Nos 7 and 8 were sufficient in the ordinary course of nature to cause

death. The chance of survival was nil because the deceased had lost a lot of blood and all the structures in the neck region had been severed. In the opinion of PW3, a sharp object like the knife exh P65A could most likely inflict the injuries on the neck region of the deceased. PW3 opined that the extent of the injuries indicated a struggle between the deceased with one or more assailants. However PW3 was unable to comment whether the assailant was left or right handed. According to PW3 the wounds over the neck region could have been caused while the assailant(s) were behind the deceased while the deceased was restrained.

[18] Muhammad Azri bin Ramlan ('PW9') was the monitor for the appellant's class. The evidence of PW9 showed that the appellant was absent from the morning school assembly which started from 7.30am till past 8am. In the attendance register (exh P71), PW9's assistant by the name of Fatimah Haziqah had marked the appellant as 'absent'. However at about 10.50–10.55am, the appellant met PW9 and told PW9 that he was late for class because he had to take a test at the staff room. So PW9 then erased the appellant's name in the attendance register using liquid paper and made a note that the appellant took a test in the staff room. However, the appellant's class teacher Aziza bt Rohani ('PW10') testified that if a student who had missed a test was required to take the test in the staff room, a letter to such effect would be issued to the affected student. PW10 said no letter was issued to the appellant. During the test in the staff room, a teacher would be present to supervise the student. On that particular day she had been in and out of the staff room but she did not see the appellant there.

FINDINGS AT THE END OF THE PROSECUTION CASE

[19] At the end of the prosecution case, the trial judge ruled that the statements made by the appellant to PW4 as recorded in police report exh P12 were inadmissible. However the learned trial judge ruled that the subsequent conduct of the appellant, where he led PW4 to the various locations from where the various exhibits were recovered was admissible under s 8 of the Evidence Act 1950. The trial judge found that the explanation given by the appellant to PW9 for his absence from school that morning until about 10.50–10.55 am was false and was a deliberate lie and this can be regarded as corroborative evidence against the appellant until explained or rebutted by him (*Syed Ali bin Syed Abdul Hamid & Anor v Public Prosecutor* [1982] 1 MLJ 132; *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717).

[20] The learned trial judge found that the presence of the appellant's DNA at the crime scene is conclusive proof of the appellant's identity (*Public Prosecutor v Hanif Basree bin Abdul Rahman* [2008] 3 MLJ 161). No trace of DNA from any other individual was found at the scene. His Lordship also took

into consideration the injuries found on the appellant. According to the trial judge, the most potent and damning evidence is the presence of the mixed DNA profiles of the appellant and the deceased on the knife exhs P67A and P67B. Since DNA as proof of identity is practically conclusive, the trial judge found that the reasonable conclusion is that the appellant had used the knife to slash the neck of the deceased and caused his death. Thus having conducted a maximum evaluation of the evidence adduced by the prosecution, the trial judge found that the cumulative effect of the evidence is sufficient to show that it was the appellant who had used the knives to inflict the fatal slash wounds on the deceased. The trial judge found that the prosecution has established a prima facie case against the appellant. However His Lordship amended the time as stated in the charge to read 'hingga 11.00 pagi' instead of 'hingga 1.00 petang'. The amended charge was read to the appellant who maintained his plea of not guilty and the appellant was called upon to enter his defence. We agree with the trial judge. We find that the prosecution has adduced sufficient evidence to establish a prima facie case against the appellant.

THE DEFENCE CASE

[21] The thrust of the defence case is that the deceased was killed by a third party by the name of 'Eswaran'. According to the appellant, on the morning of the incident his brother had sent him to school at about 7.25–7.30am. At the school he had met Eswaran, who was 27 years old and was not a student. While he was talking to Eswaran, the deceased's sister ('DW2') came to him and asked him to advise the deceased who apparently had refused to listen to her lately and was not focussing on his studies. Eswaran then asked him to go to the deceased's house. He went with Eswaran by riding pillion on Eswaran's motorcycle. According to the appellant, Eswaran was known to the deceased. They left at about 7.45–7.50am and arrived at the deceased's house about 15 minutes later.

[22] The deceased opened the door. They entered the house and all of them sat in the living room. Then Eswaran went into a room in the house. They heard a cupboard being opened. The deceased went into the room. He heard the deceased scolding Eswaran. He then went into the room. He saw Eswaran slapped the deceased. After Eswaran had slapped the deceased, the deceased left the room and returned with a knife. The appellant identified exh P67A as the knife. The deceased tried to slash Eswaran with the knife.

[23] The appellant said that he had tried to break up the fight and wrest the knife from the deceased. In the process his hand and ear lobe were injured. The deceased became angry at him and kicked him in the stomach and he fell to the floor. He then used the towel (exh P3(21)) to wipe the blood from his hand and ear. Both the deceased and Eswaran continued to fight. When they both fell

onto the bed, the bed broke. Both then rose from the bed and he saw Eswaran 'locked' his hand around the deceased's neck. Eswaran then took out a knife with a black handle with his left hand and slashed the deceased's neck. The appellant then left the room and went to the bathroom to wash away the blood from his hand and earlobe.

[24] When he came out from the bathroom he saw Eswaran wiping his left hand with a towel. Eswaran then wrapped the towel around the deceased's neck as blood was pouring from the wound. Eswaran then urged him to leave immediately. His hand and earlobe were still bleeding at the time. They both left on Eswaran's motorcycle. According to the appellant the t-shirt exh P69A and jeans exh P70A were worn by Eswaran.

[25] Eswaran took him to Lengkok Mahsuri where Eswaran lived. Eswaran went to his house while he waited. Then Eswaran came back wearing different clothes and placed the clothes that he had worn into the motorcycle basket. They then went to another block of flats nearby and Eswaran then took the clothes to the rubbish dump. After that Eswaran sent him back to school and asked him to see the class monitor to change his attendance record.

[26] According to the appellant, Eswaran had also warned him not to tell anyone about the incident or otherwise he would kill the appellant's family members. He said he believed Eswaran's threats because Eswaran was a gangster who had previously taken money from him. Eswaran had also taken his mother's jewellery and his mother had lodged a police report. But he did not tell her what had happened. In cross-examination the appellant denied that he had made up the story that it was Eswaran who had killed the deceased.

[27] The deceased's sister (DW2) denied that Eswaran and another person were together with the appellant when she met the appellant at the school on the morning of the incident. According to her, she had met the appellant twice. The first time was at about 7.20am. The appellant was alone. The appellant had asked her whether the deceased had come to school. She had told the appellant that the deceased did not come to school in the morning because the co-curricullur activity had been cancelled. Later at about 12–12.50pm, the appellant had come to meet her again and told her that the school bus had arrived but the deceased had not come to school. The appellant then left and about 2–3 minutes later he came back and told DW2 that he had called the deceased but the deceased had not answered his call. DW2 was surprised. She then called her father to inform him that her brother had not come to school.

A FINDING AT THE END OF THE DEFENCE CASE

[28] The learned trial judge considered the defence case and found that the appellant's defence was a bare denial. He had shifted the blame to one Eswaran but the trial judge found that this was not sufficient to dislodge the prosecution's case (*Public Prosecutor v Nomezam Apandy bin Abu Hassan (No 2)* [2008] 1 MLJ 681). The learned judge did not accept that Eswaran was involved in the murder and the attempt by the defence to raise a reasonable doubt by implicating Eswaran had failed.

[29] The learned judge found 'not a speck of Eswaran's DNA' at the crime scene despite the alleged combatant role played by Eswaran in the fight with the deceased. On the other hand the appellant's DNA was found in the deceased's house even though he said that he merely acted in a less aggressive role. Further the appellant's DNA and the deceased's DNA were found on the broken knife exh P67A and its broken handle exh P67B. The deceased's DNA was found on knife exh P65A. No DNA of Eswaran was found on both knives.

[30] The learned judge further noted that at the time of his arrest by PW4, the appellant did not disclose the involvement of Eswaran to PW4 or that he had sustained injuries in the midst of breaking up the fight between Eswaran and the deceased. About three months after the murder, the appellant told his father that it was Eswaran who had stolen his mother's jewellery and the threat made by Eswaran against his family. His father then lodged a police report. It was in the course of police investigation on the said report that the appellant told PW4 that the deceased was murdered by Eswaran. The jewellery that were pawned under the name of Eswaran were recovered by the police but the trial judge noted that no identification of the jewellery was made by the appellant's mother. The trial judge found that the link between the loss of the jewellery which was attributed to Eswaran who was in turn linked to the murder of the deceased was farfetched and difficult to accept. His Lordship found no evidence that Eswaran was involved in the murder.

[31] The trial judge found that the appellant had failed to sufficiently explain his subsequent conduct in bringing PW4 to the rubbish dumpsite and pointing out exhs P70A, P69A, P65A, P67A and P67B to PW4. The learned judge accepted the evidence of DW2 that the two knives did not belong to her family and found that it was the appellant who had brought the knives with him. His Lordship also found that the appellant's evidence that Eswaran was with him when he met DW2 on the morning of the incident was untrue. His Lordship also noted that the appellant looked ill at ease when testifying and he appeared to have rehearsed and tried hard to put the defence narrative in sequence.

[32] On a totality of the evidence, the trial judge found that the defence had failed to cast a reasonable doubt on the prosecution's case and that the prosecution has proved its case beyond reasonable doubt. Accordingly the appellant was convicted of murder as per the amended charge. Having considered the appellant's age His Lordship ordered the appellant to be detained in prison during the pleasure of TYT Yang DiPertua Negeri pursuant to s 97(2) of the Child Act 2001.

THE APPEAL

[33] In support of the defence contention that the appellant did not murder the deceased, learned counsel raised the following issues.

[34] Learned counsel submitted that the trial judge has failed to consider the testimony of PW3 who had testified that the slash wound to the deceased's neck had extended from below the right earlobe to the left earlobe. It was submitted that the slash wound must have been inflicted by a person who is left-handed as it was not possible for a right-handed person to inflict the wound from the right to the left of the deceased's neck.

[35] We have perused the evidence of PW3. We agree with the learned DPP that in his testimony, PW3 did not categorically suggest that the wounds to the deceased's neck could only have been inflicted by a left-handed person, as suggested by the learned counsel. His testimony merely shows that the wounds over the neck could have been caused while the assailant or assailants were behind the deceased. In cross-examination, PW3 had only stated that he could not comment on whether the assailant was left or right-handed. PW3 was not asked whether the wounds found on the deceased's neck could not have been inflicted by a right-handed person. Learned counsel however did suggest to PW7, in his cross-examination of PW7, that the appellant is a right-handed person but PW7 answered that he was not sure.

[36] We are of the considered view that a mere description of the wounds on the deceased's neck coupled with the absence of a specific assertion by PW3 that the slash wounds could only have been inflicted by a left-handed person is not sufficient to support learned counsel's contention that these wounds could only have been inflicted by a left-handed person. There is also no evidence to indicate that the appellant is a right-handed person. This matter was never put to him when he was in the witness box.

[37] Learned counsel had also raised the issue of the towel that was wrapped around the deceased's neck as shown in photographs P4(1)–(3) which was not produced by the prosecution. Learned counsel contended that the failure to

produce this towel has prejudiced the defence since the appellant had stated that Eswaran had used this towel to wipe his hands. It was submitted that the trial judge ought to have invoked s 114(g) of the Evidence Act 1950 against the prosecution. The learned DPP on the other hand submitted that the trial judge is correct not to invoke s 114(g) as it is not applicable. Learned DPP referred to the explanation offered through Subramaniam a/l Muniandy ('PW11') who had assisted PW3 in the post-mortem examination of the deceased. According to PW11, the said towel had been taken and mistakenly disposed of by the cleaner.

[38] The testimony of PW11 is as follows:

> Saya bantu Dr Bhupinder Singh dengan membuka pakaian simati dan juga membuka tuala yang diletakkan dibahagian lehernya ... Saya mengambil pakaian itu dan saya jemur di atas meja yang post mortem kosong. Saya juga jemur tuala itu di bawah meja post mortem di atas lantai sebab terlampau dibasahi darah.
>
> Setelah kering keesokan hari, MA saya Encik Mohamad Nazri telah membungkusnya dan dia beritahu tuala yang dijemur di atas lantai bawah meja post mortem sudah tidak ada. Saya tanya 'cleaner' mengenai tuala itu dan saya diberitahu telah dibuang di dalam 'clinical waste'. Saya bersama 'cleaner' telah mencarinya tetapi tidak menjumpainya.

[39] We find that the explanation given by PW11 was not seriously challenged. Thus the evidence shows that the towel went missing when it was in the custody of the hospital. It had been inadvertently disposed of by the hospital cleaner. Despite efforts made, the towel could not be found. The trial judge had accepted the explanation provided by the prosecution. We agree with the trial judge. On the evidence we find that s 114(g) does not apply.

[40] The next issue raised by learned counsel was with regard to the absence of blood on the appellant's school uniform and shoes. Learned counsel had submitted that there was no suggestion that the appellant had gone home to change his clothes. It was submitted that this raised the question as to who had worn the blue coloured t-shirt (exh P69A) and the blue jeans (exh P70A) on which the deceased's DNA was found (Nos 9 and 10 in photograph exh P5E).

[41] The answer to the question posed by learned counsel can be found in the appellant's testimony. This is what the appellant had said (p 159 appeal record):

> Semasa saya keluar dari bilik tersebut, saya nampak Eswaran telah lap tangan kirinya dan dia telah buangkan tuala itu dileher si mati. Eswaran telah melilit tuala itu di leher si mati sebab darah memancut keluar.
>
> Masa itu saya lihat Eswaran memakai baju T berleher bulat berwarna biru dengan perkataan 'Element' dan sepasang jean berwarna biru juga.

[42] However, we find that the chemist report does not support the appellant's contention that these items of clothing were worn by Eswaran. These clothing were blood-stained and the chemist was able to develop a DNA profile of the deceased. No DNA of a third party was found. The absence of a third party DNA leads to the only reasonable conclusion that Eswaran never wore these clothing.

[43] The chemist was able to develop the appellant's DNA profile from the blood stains found on the t-shirt bearing the words 'SMK Tun Raja Uda' (exh P56A). The presence of the appellant's blood on this t-shirt suggests that at the time when he had worn this t-shirt, he was injured. There was no explanation as to how or why this t-shirt was stained with the appellant's blood.

[44] The evidence shows that the appellant had gone to school in his school uniform. In cross-examination, PW7 states as follows:

> Pada pagi hari kejadian, Keethanjeli ada memberitahu setelah turun dari bas, dia lihat Pesalah di sekolah. Masa itu Pesalah berpakaian uniform sekolah.

[45] Later at about 10.55am, the appellant met with PW9. No issue was raised about his clothes. It was also still school hours. The reasonable conclusion is that the appellant was in his school uniform in the morning when he had met with DW2 and also later that morning when he had met with PW9. Yet his blood was found on his school t-shirt. This t-shirt had also been discarded at the rubbish dump. The evidence indicates that sometime between 8–10.55am, the appellant had changed from his school uniform to his t-shirt. The reasonable inference is that when the appellant went to the deceased's house that morning, he had worn his school t-shirt and not his school uniform. When the appellant returned to school, he was again in his school uniform. The fact that the appellant was absent from school for approximately three hours from about 8–10.55am is not disputed. In the circumstances, we are of the opinion that there was sufficient time for him to change his clothes.

[46] Another issue raised by learned counsel was with regard to the positions of the 'bakul' in the photographs exhs P5A and 5B (p 303 appeal record). It was submitted that the prosecution has not explained why the position of the 'bakul' in photograph P5A differed with the position as shown in photograph P5B. We find no basis for the learned counsel to raise this issue because this issue was not raised with the police photographer PW1 who had taken the photographs. Neither was an explanation sought from PW7 or PW4 who were both present when the photographs were taken. This omission by the defence has deprived the prosecution of the opportunity to explain the difference in the position of the 'bakul'. In any event we are of the view that nothing turns on this issue and the defence has not been seriously prejudiced.

[47] Was the deceased killed by Eswaran, as the appellant alleged? The trial judge has given reasons why he did not accept the appellant's defence that the murder was carried out by Eswaran, as follows:

(a) the appellant looked ill at ease in the witness box and appeared to have rehearsed and was trying hard to put the defence narrative in sequence;

(b) there was not a speck of Eswaran's DNA profile found in the deceased's house having regard to the combatant role of Eswaran in the fight with the deceased;

(c) it is hard to believe that the appellant's DNA profile would be found everywhere in the deceased's house on the floor of the living room, the dining and kitchen areas, on the curtains in the deceased's room and on the toilet bowl when according to the appellant he had acted as a 'mediator' only;

(d) the presence of the deceased's DNA profile on the knife marked as exh P65A;

(e) the presence of mixed DNA of the appellant and the deceased on the knife exh P67A and its handle P67B;

(f) no DNA of Eswaran was found on the knives;

(g) PW3 was of the opinion that the knives would have been used to slash the deceased's neck;

(h) the appellant failed to disclose Eswaran's involvement to PW4 at the most opportune time for him to do so when PW4 came to his parents' mini market to arrest him;

(i) the appellant's conduct was inconsistent with the conduct of an innocent person;

(j) his testimony that he was at school together with two other persons when he met with DW2 on the morning of the day of the incident was contradicted by DW2 thus showing that the presence of Eswaran that morning was not true;

(k) Eswaran had taken the jewellery belonging to the appellant's mother and but the appellant never disclosed to his mother that Eswaran was the culprit;

(l) about 3½ months after the murder was committed, the appellant told Sub-Insp Lee Kok Chee ('DW4') that the deceased was murdered by Eswaran;

(m) DW4 was investigating a police report lodged by the appellant's father against Eswaran for criminal intimidation because the appellant had told him that Eswaran was making threats against his family;

(n) there is no evidence to link the jewellery pawned by Eswaran to the appellant's mother because the appellant's mother was never called to identify the jewellery seized from the pawn shops; and

(o) the link between the lost jewellery which was attributed to Eswaran who was in turn linked to the murder is far-fetched and difficult to accept.

[48] We find that the trial judge has not erred when His Lordship found that Eswaran was not involved in the murder of the deceased. Based on the appellant's evidence, the deceased had attacked Eswaran with the knife exh P67A. Eswaran managed to evade. Then Eswaran 'locked' the deceased from behind and with his left hand he took out another knife with a black handle (exh P65A) and slashed the deceased's neck. The chemist report however shows that only the deceased's DNA was found on the knife exh P65A but a mixed DNA profile of both the deceased and the appellant was found on the knife exh P67A. Having considered the DNA evidence, we are of the view that the knife most likely used to cut the deceased's throat was the knife exh P67A and the deceased's throat was slashed by the appellant.

[49] We are of the view that the testimony of the appellant has to be considered with caution because of inconsistencies. His evidence that he was together with Eswaran when he was approached by DW2 on the morning of the incident was denied by DW2. His class teacher PW11 has contradicted his testimony that he had to take a test at the staff room that morning. Although he fully well knew the deceased's fate that morning, he showed no concern and even went to the extent of giving DW2 the impression that he had no knowledge why the deceased had not come to school. He did not tell his parents what had happened to the deceased. Neither did he tell PW4 about Eswaran until approximately three months later. Even the independent chemist evidence does not support the appellant's story. We find that the appellant has shown that he is not a credible witness. His story about Eswaran and his mother's missing jewellery, even if true, does not show any nexus between Eswaran and the deceased's murder. The appellant's attempt to implicate Eswaran in the murder of the deceased is unsupported by any credible evidence. In our view, it is a feeble attempt to deflect blame.

[50] On the facts, this is a case of murder under limb (b) of s 300 of the Penal Code which provides as follows:

> Except in the cases hereinafter excepted, culpable homicide is murder —
>
> *(b)* if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

The brutal manner in which the appellant slashed the deceased's throat indicates in no uncertain terms that the appellant did the act with the knowledge that the resultant injury was likely to cause the death of the

deceased. This was borne out by the evidence of PW3 who said that the deceased had no chance of survival at all. We find that the prosecution has proved its case beyond reasonable doubt and the defence has failed to raise any reasonable doubt in the prosecution case. We find that the conviction is safe.

[51] For the reasons stated above, we dismissed the appeal and affirm the conviction and sentence made by the High Court.

Appeal dismissed and conviction and sentence by High Court affirmed.

Reported by Dzulqarnain Ab Fatar